In The

Supreme Court of the United States

October Term, 1965
No. 47

JAY GIACCIO,
Appellant

vs.

COMMONWEALTH OF PENNSYLVANIA,
Appellee

On Appeal from the Supreme Court of Pennsylvania, Eastern District

BRIEF FOR APPELLEE

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Is the Act of 1860, pertaining to the disposition of court costs upon the trial of misdemeanor cases, unconstitutionally vague as construed by the Supreme Court of Pennsylvania and as applied by the Pennsylvania Courts since 1804?

2. Is the procedure for applying the provisions of the Act of 1860 as established by the Legislature of Pennsylvania contrary to the requirements of the Due Process Clause of the Fourteenth Amendment of the United States Constitution?

a. Is it fundamentally unfair not to excuse a person found not guilty of a particular crime from all liability for his actions in connection with the prosecution?

3. Is it contrary to the requirements of the "equal protection" provisions of the Fourteenth Amendment for the legislature of Pennsylvania to provide differently for the placement of costs in the case of felonies, misdemeanors and summary proceedings, each of which is substantially and historically different?

STATEMENT OF THE CASE

The Appellant, Jay Giaccio, was indicted and tried on bills of indictment 225 and 226, September Sessions 1961, in the Court of Quarter Sessions of Chester County, Pennsylvania. Each of the above bills of indictment charged the misdemeanor of unlawfully and wantonly pointing and discharging a firearm at each of two different persons. This is a violation of the Act of June 24, 1939, P. L. 872, 716; Stat. Ann. tit. 18, 4716. At the trial of the case before the judge and jury, the Appellant preferred to represent himself and refused the offer of the trial court to appoint counsel for him. The substance of the Appellant's defense was that the only firearm which he had pointed or discharged at any person was a blank starter pistol.

After hearing the evidence, the charge of the Court, and due deliberation, the jury returned a verdict of not guilty on each bill of indictment and ordered the County to pay the costs on Bill Number 226 and directed that the Appellant pay the costs of prosecution on Bill Number 225.

Thereafter, at the behest of Appellant and upon request of the court, the District Attorney's Office prepared for the Appellant a Petition to be relieved from the payment of costs and that Petition was filed on April 21, 1962.

A hearing was had on Appellant's motion on April 27, 1962, and on June 13, 1962, James C. N. Paul, Esquire,

and Peter Hearn, Esquire, appeared as counsel for the Appellant and filed a petition for rehearing. That petition was granted and argument had, at which time Appellant's counsel asserted the Constitutional objections which are the basis for the present appeal.

On January 12, 1963, President Judge Thomas C. Gawthrop filed an Opinion in the Court of Quarter Sessions of Chester County, holding so much of Section 62 of the Act of 1860, P. L. 375 Pa. Stat. Ann. tit. 19, Section 1222, as gave the jury power to place the costs on acquitted defendants in misdemeanor cases unconstitutional and ordered the sentence imposing costs vacated.

Thereafter, the Commonwealth filed an appeal from that order and certiorari was directed to the Clerk of the Court of Quarter Sessions, Chester County, Pennsylvania, on February 28, 1963.

On December 12, 1963, the Superior Court of Pennsylvania with only one judge dissenting reversed the order of the trial court and reinstated the jury's determination as to the payment of costs.

The matter was then taken on appeal to the Supreme Court of Pennsylvania, and on July 6, 1964, that court with a majority of five to one affirmed the order of the Superior Court. Thereafter, Appellant, through his counsel, filed a Notice of Appeal to the Supreme Court of the United States and after the filing of a Jurisdictional Statement and Commonwealth's Motion To Dismiss the Appeal on jurisdictional grounds, this Honorable Court noted probable jurisdiction.

The Appellant is not presently and never has been confined in prison.

SUMMARY OF THE ARGUMENT

The Act of 1860 creates no vague new criminal offense to entrap the unsuspecting. The Act intends and encompasses nothing more than a procedure whereby the machinery of the criminal courts is used to dispose of the court costs. *Commonwealth vs. Giaccio,* 415 Pa. 139, 202 A. 2nd 55 (R. 51).

The application and interpretation of the provisions of the Act of 1860 over the years indicates that it is not a penal statute to be judged by the same standards as a law creating a new offense. The interpretation of this statute by the courts of Pennsylvania and the common law surrounding costs in criminal cases should not be overlooked or ignored by this court. *Bandini Petroleum v. Supreme Court,* 284 U. S. 8; *Musser v. Utah,* 333 U. S. 95.

At common law in Pennsylvania, the defendant always paid the costs of prosecution. The Pennsylvania legislature since 1791 has struggled with the placement of costs in criminal cases until it reached the middle ground between the defendant always paying the costs and the defendant never paying the costs.

Regardless of what label is put on the Act of 1860, civil, penal or something in between, it is not void as being too vague. The Appellant was arrested, indicted, and tried by the judge and jury for committing a statutorily well-defined misdemeanor. The rules of evidence and the charge of the court strictly limit that which the jury can

consider in deciding the defendant's liability for costs. Because the jury is given the power to assess a person's behavior and because they may judge it differently than did that person himself is in no way fatal to this Act. *Nash v. United States,* 229 U. S. 373.

The jury is given some guided discretion to apply its judgment to a limited set of facts and to make a determination of liability. Such procedure is not constitutionally condemned. *Roth v. U. S.,* 354 U. S. 476.

Procedurally, the Act of 1860 does not violate the Due Process Provision of the Fourteenth Amendment. The fact that the placement of costs is considered incidentally to the trial for the misdemeanor offense and without a separate and distinct hearing is not fatal to its constitutionality. *Lowe v. Kansas,* 163 U. S. 81.

The possibility of abusive use of the costs provisions of this Act is well controlled. The harassing prosecutor is discouraged and punished by the power given to the jury by this Act to place the costs upon him. An irresponsible jury determination is subject to being set aside by the trial court. *Guffy v. Commonwealth,* 2 Grant 66 (Pa. Supreme Court 1853).

The legislative and case history of the Act of 1860 shows that there has been no serious objections made either to its substance or procedure in the more than 100 years that it has been in effect. In view of this, it is doubtful that this Act is fundamentally unfair as Appellant asserts.

It cannot be denied that this Act is unique in the present day and age; however, uniqueness should not be equated with badness, and the legislature rather than the

courts should judge the wiseness and acceptability of this Act. *Ferguson v. Skrupa,* 372 U. S. 726.

Finally, the fact that defendants acquitted of misdemeanors are treated differently from defendants in felony or summary matters does not violate the Equal Protection Clause of the Fourteenth Amendment. The historical and actual difference in the quality and severity of felonies, misdemeanors, and summary offenses is sufficient to overcome the objection that the legislative classification is palpably arbitrary. *Phillips Chemical Co. v. Dumas School District,* 361 U. S. 376; *Skinner v. Oklahoma,* 316 U. S. 535.

ARGUMENT

I. THE ACT OF 1860 IS NOT UNCONSTITUTIONALLY VAGUE AS APPLIED BY THE COURTS OF PENNSYLVANIA SINCE 1804 AND AS CONSTRUED BY THE SUPREME COURT OF PENNSYLVANIA

A. The Act of 1960[1] as viewed by the Pennsylvania Courts is not a penal statute.

It is clear that under the law of Pennsylvania that the court costs attendant to criminal prosecutions form no part of the penalty proposed for the substantive offense. As pointed out in the Opinion of the Pennsylvania Supreme Court, costs are considered as a matter separate and apart from the penalty for a crime (R. 50). The Opinion of the Supreme Court of Pennsylvania easily meets the Appellant's arguments that the act is clearly penal because the courts through the years have used such terms as "misconduct", "guilty", "penalty" and so forth. The court pointed out that these terms are not used in their technical sense but rather in a broader sense (R. 50).

It is argued that the possibility of imprisonment of a person for failing to pay the costs assessed against him

[1] Act of March 31, 1860, P. L. 427, Pa. Stat. Ann. tit. 19, Section 1222.

is a clear indication of the nature of the act. In answer to this, the Opinion of the Supreme Court of Pennsylvania points out that this is no more than "the court's exercise of its power to punish for contempt". The court further points out that a pauperous or insolvent defendant can be relieved of the payment of these costs without imprisonment (R. 50, footnote 5).

Whether this court is bound by the Pennsylvania Courts' characterization of the Act of 1860 is not the prime consideration. The important consideration is that the Pennsylvania Courts' characterization of this Act as civil rather than penal is some evidence of how the Act has been applied through the years. Such considerations and characterizations should not be ignored by this court. *Bandini Petroleum v. Superior Court,* 284 U. S. 8; *Musser v. Utah,* 333 U. S. 95 and *Beauharnais v. Illinois,* 343 U. S. 250.

B. The Act of 1860 is not vague or uncertain when it is considered in conjunction with the body of law which preceded it and surrounds it.

Whether civil or penal in nature, the Appellee contends that the Act of 1860, as interpreted and applied by the Pennsylvania Courts, provides sufficient standards to satisfy the requirements of the Fourteenth Amendment. In making the determination as to whether this Statute is sufficient to withstand Appellant's objections, the words of the Act of 1860 cannot be considered in a vacuum. These provisions must be considered as a "part of the

whole body of common and state law of (the) state and to be judged in that context." *Musser v. Utah*, supra, 97.

Turning first to the common law of Pennsylvania with respect to costs in criminal cases, it appears that in Pennsylvania "by the common law, a defendant, though acquitted, always paid the costs."[2] The Appellant contends that the foregoing statement is either erroneous or at least that the common law situation in Pennsylvania is contrary to that found elsewhere. The Appellee would point out, however, that the common law situation in Pennsylvania was not completely anomalous. As this court observed in *U. S. v. Gaines*, 131 U. S. CLXIX, Appx., 25 L. Ed. 733 at common law the state never paid the costs. Evidence of the fact that the common law liability for costs remain even after acquittal can be found in two cases tried in the State of Delaware in the 18th and 19th Century.[3]

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[2] *Commonwealth v. Tilghman*, 4 S. & R. 127 (Pa. Supreme Ct. 1818). The above statement was made by Justice Gibson while reviewing the Act of 1804, the predecessor to the Act of 1860.

[3] Evidence of what the law in the State of Delaware was in the late 18th and 19th Centuries can be found in the cases of *State v. Miller*, 1 Del. Cas. 512 (1814), and *State v. Butcher*, 1 Del. Cas. 334 (1793); Delaware Code Annotated, Title 11, Section 4102. In the former case a prisoner who had been acquitted of burglary and who was unable to pay the costs was sold as a servant after the Court certified there was probable cause for the prosecution. In the latter case counsel for the defendant acquitted of indictments charging assault and battery moved for the defendant's discharge and counsel for the State objected that this could not be accomplished until the costs were paid. Further evidence, as to the early law in Pennsylvania, can be found in the Preamble of the Act of March 20, 1797, 3 Smiths Law 281, which stated, inter alia, "whereas, by the existing laws, a party acquitted is equally liable to the costs of prosecution as if he were convicted."

If the foregoing can be accepted as some evidence of what the law as to costs was in the early 19th Century, it would appear that the defendant's present possible liability for costs in Pennsylvania, while different from other jurisdictions, has at least been greatly improved by the legislature. The foregoing is not intended to be evidence of facetious thinking on the part of the Appellee, but rather to point out that, although the Legislature in Pennsylvania has not gone as far as other jurisdictions, it has at least consciously wrestled with the question of cost liability since 1797.

The Appellant takes the position that a review of the legislation concerning costs in criminal cases, starting in 1791 and proceeding through 1860, indicates that the present state of law is a legislative accident. It is argued that once having completely relieved defendants of their common law burden of paying the costs that the legislature in 1804 in endeavoring to discourage malicious prosecutions inadvertently created the present state of the law.[4] This appears to presume a great deal as the words pertaining to the liability of defendants for costs are clearly stated. It does not have the appearance of being a case of a printer's error, or a misplaced comma, or word. It is equally consistent to believe that the Act of 1804 and the Act of 1860 were a rational retreat towards the middle ground between costs always on the defendant and costs always on the State. At any rate the 56 years of applica-

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[4] The Appellant in his brief at footnote 9, pages 13 and 14, sets forth the pertinent portions of the Acts of 1791, 1797 and 1804.

Act of 1791, P. L. 37, 43, 44, 3 Smiths Laws 44;

Act of March 20, 1797, 3 Smiths Laws 281;

Act of 1804, 4 Smiths Laws 204.

tion of the Act of 1804 brought no legislative reaction in the Act of 1860.

The Appellant asserts that the language used by the Pennsylvania Courts in their charges and by the Superior Court in its opinion (R. 15) is clear evidence the Act of 1860 is too vague. The Appellant likens the Act of 1860 to the legislation condemned in *Baggett v. Bullit*, 377 U. S. 360, and *Lanzetta v. New Jersey*, 306 U.S. 451. The Appellant asserts that this Act must fall as did that legislation. The vagueness in those cases was found to be repugnant to the due process clause because the state is able to cast the net at large to trap the unsuspecting citizen. *Winters v. New York*, 333 U. S. 507, 540.

The crucial point to be recognized is that there is a substantial difference between the statutes in *Lanzetta* and *Bullit* and the present Act. As is apparent by the foregoing common law and legislative history of the Act of 1860, that it moves into no new area of human rights. It is not a statute which creates a vague new crime. It might be termed a "cleanup" provision or as Justice Roberts, speaking for the Supreme Court of Pennsylvania, put it, "nothing more is here involved than utilization of the machinery of the courts of quarter sessions for the disposition of costs." (R. 51)

Contrary to the *Lanzetta* case, the Appellant in this matter was not arrested, indicted or tried for the crime of "some misconduct" which was "offensive to morality". He was arrested, indicted and tried for violating a criminal statute of Pennsylvania which makes it a crime to playfully or wantonly point or discharge a firearm at another person.

The procedure established in the Act of 1860 does not allow the cost liability to be used as a dragnet or harass-

ment. A defendant does not face any liability for costs until a prima facie case has been established before the magistrate, the grand jury, and the judge and jury. Furthermore, the chance for abuse of the provisions of the Act of 1860 by prosecutors with a mind for harassment is largely eliminated by the provisions of the Act which make the malicious prosecutor liable for the costs at the jury's hand. It is admitted by Appellant that the legislature has the power to place costs on acquitted defendants, but it is asserted that the present statute is improperly drawn for this end. This raises several points. First, has not the legislature done all that it can? It would approach the impossible to write a statute which could define every kind of "impropriety of conduct" which would give rise to every misdemeanor prosecution. It is submitted that the Constitution does not require impossible standards, but only that the language of the statute convey a sufficiently definite warning when measured by common understanding and practice, *Roth v. United States,* 354 U. S. 476.

Second, has there been any abuse of the legislative power which violates the Fourteenth Amendment? The Legislature could have said, as did the common law, that the defendant will always pay the costs. *Lowe v. Kansas,* 163 U. S. 81, 86, 87. Is the constitution violated because the jury has the power to decide that a person may or may not be liable for the costs? Appellee would submit not. As the Pennsylvania Supreme Court stated, the defendant is not taken by surprise as "the provisions of the statute constitute clear notice and inform both prosecutor and defendant that the matter of costs may be determined incidentally to the basic issue of guilt or innocence". (R. 52)

Finally, there is the question of how much notice a person in the Appellant's position can expect or require. In considering this, Justice Holmes' often quoted statement in *Nash v. United States*, 229 U. S. 373, 377, is appropriate:

> "The law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree. If his judgment is wrong, not only may he incur a fine or a short imprisonment, as here; he may incur the penalty of death . . . The criterion in such cases is to examine whether common social duty would under the circumstances have suggested a more circumspect conduct."

It is submitted that the jury in disposing of the costs of prosecution pursuant to the Act of 1860 is doing no more than determining whether "common social duty would, under the circumstances have suggested a more circumspect conduct" on the part of the Appellant or other defendant.

The Appellant urges that if the Act of 1860 is upheld that its net will be spread wider to punish an ever increasing number of persons. A brief reflection on the nature of this Act should belie such assertion. The question of costs follows the arrest and trial for a misdemeanor. No person can ever be arrested and tried for being guilty of some misconduct. If the Commonwealth at any stage of the proceedings fails to establish a prima facie case, the prosecution may be discharged on demurrer and the defendant would have no further liability of any nature. It can only be reiterated that this is not a dragnet statute or a new law which endeavors to creep into areas of human rights protected by the constitution.

Argument

The fact that the procedure for the disposing of costs in misdemeanor cases works no hardship is apparent when one considers that since 1804 only two cases have sought to question the legality or justice of this Act.[5] The reason for this must be that the jury's power to dispose of costs "works substantial justice."[6] Why this is and why, as the Appellant observes, a defendant acquitted, but ordered by the jury to pay part or all of the costs, usually promptly settles the matter is probably best explained by the following observations of Judge J. Frank Graff in *Commonwealth v. King*, 37 Pa. D. & C. 2d, 235 (Quarter Sessions, Allegheny County) which were concurred in by the Pennsylvania Superior and Supreme Court (R. 7, 53):

> "As a factual matter, from a vast experience in the trial of cases, juries are reluctant upon occasion to adjudge a defendant guilty and seek the alternative of not making a record against him, but requiring him to pay the costs . . ."

or as Justice Roberts observes, it is the fervent hope of the defendant that the jury will return a verdict of not guilty but pay the costs (R. 53).

In conclusion, it might be pointed out that the Appellant's worries over serious constitutional abuses arising in the future would seem to be questionable, if one considers that evidence of such abuses is not apparent in the 101 years since 1804.[7]

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[5] *Commonwealth v. Tilghman*, supra; *Wright v. Commonwealth*, 77 Pa. 470 (1875).

[6] *Commonwealth v. Cohen*, 102 Pa. Superior Ct. 379, cited with approval in the Superior Court's Opinion in this case (R. 6).

[7] Cf. observation by Judge Woodside in Superior Court's Opinion at R. 9:

II. THE PROCEDURE UNDER THE ACT OF 1860 OF ALLOWING THE JURY UNDER THE CONTROL OF THE COURT TO ASSESS COSTS AGAINST AN ACQUITTED MISDEMEANOR DEFENDANT IS NOT CONTRARY TO DUE PROCESS OF LAW NOR IS IT FUNDAMENTALLY UNFAIR

The Appellant condemns the Act of 1860 not only for the principle which it expounds, but also for the procedure it uses to implement that principle.

A number of procedural objections are leveled against the Act. Those based on vagueness and lack of notice to defend have been considered in the first part of this brief.

With regard to the objection that there is no separate or sufficient hearing provided on the issue of costs, Appellee believes that this Court passed on a similar issue in *Lowe v. Kansas,* supra. In that case, this Court considered and approved both from the standpoint of Due Process and of Equal Protection under the law, a Kansas statute which permitted the jury to place the costs on the prosecutor in a criminal libel action, without any separate hearing on the matter of costs. In considering this question, this Court approved the reasoning of the Kansas Court that "the prosecuting witness was so connected with the

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"We know of no Pennsylvania statute whose validity has been attacked after so many years of constant application. Since the Act of 1804, two new constitutions have been adopted and scores of amendments have been made to the present constitution. There have been over a hundred regular sessions of the legislature and a score of special sessions since the Act of 1804 was enacted. Hundreds of judges have examined and passed upon the statutory provisions here questioned."

state in the trial of the prosecution that he was not entitled to a separate trial by jury upon the question of liability of costs". 163 U. S. 87.

If the private prosecutor in a criminal libel action is sufficiently involved in the trial to have been afforded Due Process, then reason would seem to dictate that the defendant in this misdemeanor trial has been afforded Due Process in at least an equal or greater measure.

At the trial of the misdemeanor charge, the evidence before the jury is determined and circumscribed by the charge laid in the indictment by the rules of evidence. At Appellant's trial the evidence was directed towards the issue of whether the defendant pointed and discharged a firearm at another person. The major issue to be decided by the jury was whether the gun in question was a blank starter pistol or an operational weapon. The evidence before the jury was directed toward the proof of these facts and it was only this evidence which the jury could have considered on the issue of the placement of costs, after they first determined the issue of guilt or innocence of the defendant. It is this evidence that the jury both legally and practically had to base their cost determination upon. As the Supreme Court of Pennsylvania observed "of course, costs of a trial cannot be imposed upon a defendant for conduct not related to the prosecution, nor for conduct concerning which there is no relevant evidence". (R. 52)[8] It is the limiting of the admissible evidence which affords the defendant his due process of law. In defending

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[8] See the trial court's charge at R. 31:

"... the costs of prosecution may be placed on him if his misconduct has given rise to the prosecution. . ."

against the misdemeanor charge, the defendant also defends against his cost liability.

The Appellant is also afforded the additional protection against abuse of the Act of 1860 by the trial court's traditional common law power and right to set aside the jury's placement of costs. *Guffy v. Commonwealth,* 2 Grant 66 (Pa. Supreme Court 1853); *Commonwealth v. Bixon,* 67 Pa. Superior Ct. 554 (1917). In addition there is the usual right to appeal as so amply demonstrated by the instant matter.

The Appellant objects to the Act of 1860 as being fundamentally unfair and contrary to the basic principles of justice because it imposes a liability on "innocent" persons and because the Act of 1860 is unique.

To argue whether the Appellant, who was acquitted of the misdemeanor but suffered the imposition of costs is guilty or innocent or partly both, is to engage in semantics. A person may be innocent of one charge, but still be guilty of some other breach of duty which will subject him to liability. A person may be acquitted of involuntary manslaughter in a vehicle accident, but on the same set of facts may be "guilty of negligence" which will result in liability. That Appellant submits that it is not a mandate of the United States Constitution that a verdict of not guilty is co-extensive with perfect innocence so that a person can incur no liability of his acts. It cannot be disputed that the Act of 1860 is unique in the present day and age. The fact that many states have felt the necessity either by their constitution or by their statutes to eliminate any possible cost liability on acquitted defendants might well be considered an indication that

the legislatures of these states felt that a particular condemnation of the practice was necessary as it in and of itself did not violate the general principles of Due Process as set forth in their constitution or law. Whatever the reason for Pennsylvania being unique this uniqueness is, of course, not constitutionally fatal. As this Court said in *Ferguson v. Skrupa,* 372 U. S. 726:

> "The doctrine that prevailed . . . that due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely has long since been disregarded. We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of the legislative bodies, who elected to pass laws."

The legislature of Pennsylvania has the power to deal with the disposition of costs and it is submitted that it is that body which should make any change if the present practice is unwise or unjust.

III. IT IS NOT A VIOLATION OF THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT TO TREAT MISDEMEANOR DEFENDANTS DIFFERENTLY THAN DEFENDANTS CHARGED WITH SUMMARY OR FELONIOUS CRIMES WHEN HISTORICALLY AND SUBSTANTIVELY EACH CLASS OF CRIME AND OFFENDER IS DIFFERENT

It cannot be disputed that the acquitted defendant in a misdemeanor case in Pennsylvania is differently situated

from other defendants. The question to be answered is whether it is reasonable to classify and treat differently persons acquitted of misdemeanors from those acquitted of summary of felonious offenses. In this area the legislature's power to classify is extremely broad and is limited only by constitutional rights and "by the doctrine that a classification may not be palpably arbitrary". *Phillips Chemical Company v. Dumas School District,* 361 U. S. 376.

The burden on one asserting a legislative classification to be constitutionally improper is formidable. It has long been settled that a classification, though discriminatory, is not arbitrary nor violative of the Equal Protection Clause of the Fourteenth Amendment if any state of facts reasonably can be conceived that would sustain it. *Linsley v. Natural Carbonic Gas Co.,* 220 U. S. 61, 78; *Quong Wing v. Kirkendall,* 223 U. S. 59; *Rast v. Van Deman & Lewis Co.,* 240 U. S. 342, 357; *State Board of Tax Com'rs. of Indiana v. Jackson,* 283 U. S. at page 537.

What then are the facts which might sustain the legislative treatment of costs as contained in the Act of 1860? The reason for the different treatment of costs must lie in the difference between those offenses classified as misdemeanors and those as felonies. Although the criminal code now sets forth whether an offense is a felony or misdemeanor, it is fair to say that misdemeanors are now and always have been those offenses which are less serious than those classed as felonies. *Commonwealth v. Cano,* 389 Pa. 639, 650, 651. Because of their less serious and more common nature it could be supposed that the legislative experience indicated that misconduct either on the part of the defendant or prosecutor was likely to

precipitate an arrest and trial and that because there was such an increased possibility that the state should not in every case bear the costs of such prosecutions if they resulted in acquittals. It should also be considered that some misconduct which falls short of producing a felony conviction might well be comprehended in a misdemeanor offense, while misdemeanors in Pennsylvania are not often closely matched with summary offenses.

Justice Douglas in the case of *Skinner v. Oklahoma,* 316 U. S. 535, 540, set forth a state's power to classify crimes and offenders as follows:

> "For a state is not constrained in the exercise of its police power to ignore experience which marks a class of offenders or a family of offenses for special treatment. Nor is it prevented by the Equal Protection Clause from confining 'its restrictions to those classes of cases where its need is deemed clearest.'"

In *Lowe v. Kansas,* supra, this court held that it was not in violation of the Equal Protection Clause to treat prosecutors in criminal libel cases differently from prosecutors in other cases with regard to the placement of costs. If it is not improper to treat a party to one particular crime differently from prosecutors in all other crimes, it should not be improper to treat differently defendants in an entire class of crimes from defendants in another class of crimes.

CONCLUSION

For the reason and considerations stated above, it is submitted that this Court should affirm the judgment and order of the Supreme Court of Pennsylvania holding that the Act of 1860 is constitutional.

Respectfully submitted,
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